No. 80-429

FILED
FEB 13 198

In the Supreme Court of the United States

OCTOBER TERM, 1980

THE COUNTY OF WASHINGTON, AND SHERIFF WARREN BARNES, IN HIS CAPACITY AS SHERIFF OF WASHINGTON COUNTY, PETITIONERS

v.

ALBERTA GUNTHER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

WADE H. MCCREE, JR.
Solicitor General

JAMES P. TURNER
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

BARRY SULLIVAN
Assistant to the Solicitor General

WALTER W. BARNETT
NEIL H. COGAN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

LEROY D. CLARK
General Counsel

PHILIP B. SKLOVER
Acting Associate General Counsel

VINCENT J. BLACKWOOD
Assistant General Counsel

SUSAN BUCKINGHAM REILLY
Attorney

Equal Employment Opportunity Commission
Washington, D.C. 20506

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-429

THE COUNTY OF WASHINGTON, AND SHERIFF WARREN BARNES, IN HIS CAPACITY AS SHERIFF OF WASHINGTON COUNTY, PETITIONERS

v.

ALBERTA GUNTHER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

QUESTION PRESENTED

Whether the Equal Pay Act "authorizes" sex-based compensation discrimination, except where women can show that men are paid more for "equal" jobs, and thus precludes women, unlike other persons protected by Title VII of the Civil Rights Act of 1964, from seeking relief from compensation discrimination under Title VII, unless the particular discriminatory practice also violates the narrow prohibition of the Equal Pay Act.

TABLE OF CONTENTS

	Page
Interest of the United States and the Equal Employment Opportunity Commission	1
Statement	1
Summary of argument	4
Argument:	
I. Section 703(a) of Title VII prohibits all forms of discrimination in compensation based on race, color, religion, sex, or national origin	8
II. The Bennett Amendment does not preclude women from seeking relief under Title VII for forms of compensation discrimination that would not also violate the Equal Pay Act	12
A. The language of the Bennett Amendment	13
B. The legislative history of the Bennett Amendment	17
C. The Equal Employment Opportunity Commission's Construction of the Bennett Amendment	24
Conclusion	28

TABLE OF AUTHORITIES

Cases:

Banks v. *Chicago Trimmers Ass'n*, 390 U.S. 459	14
Burns v. *Alcala*, 420 U.S. 575	14
Caminetti v. *United States*, 242 U.S. 470	14
Chandler v. *Roudebush*, 425 U.S. 840	14
Chrysler Corp. v. *Brown*, 441 U.S. 281	16
Corning Glass Works v. *Brennan*, 417 U.S. 188	19, 22
EEOC v. *Associated Dry Goods Corp.*, No. 79-1068 (Jan. 26, 1981)	26
Ernst & Ernst v. *Hochfelder*, 425 U.S. 185	14
Franks v. *Bowman Transp. Co.*, 424 U.S. 747	9

PREVIOUS PAGE WAS BLANK

Cases—Continued Page

General Electric Co. v. *Gilbert*, 429 U.S. 125 ..... 22, 27
International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC v. *Westinghouse Electric Corp.*, 631 F.2d 1094, petitions for cert. pending, Nos. 80-781 and 80-944 (filed Dec. 11, 1980) 5, 11, 12, 13, 25
Los Angeles Department of Water and Power v. *Manhart*, 435 U.S. 702 ..... 9, 15, 24
McDonnell-Douglas Corp. v. *Green*, 411 U.S. 792 10
Morton v. *Mancari*, 417 U.S. 535 19
National Muffler Dealers Ass'n v. *United States*, 440 U.S. 472 27
Neal v. *Clark*, 95 U.S. 704 16
NLRB v. *Plasterers Local Union No. 79*, 404 U.S. 116 17
Perrin v. *United States*, 444 U.S. 37 14
Quarles v. *Phillip Morris, Inc.*, 279 F. Supp. 505 .. 11
Skidmore v. *Swift & Co.*, 323 U.S. 134 27

Statutes and regulations:

Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* 1, 5
Section 201(e), 42 U.S.C. 2000a(e) 15
Section 701, 42 U.S.C. 2000e(b) 16
Section 703(a), 42 U.S.C. 2000e-2(a) ..... *passim*
Section 703(a)(1), 42 U.S.C. 2000e-2(a)(1) .. 5, 8
Section 703(a)(2), 42 U.S.C. 2000e-2(a)(2) .. 5, 8
Section 703(e), 42 U.S.C. 2000e-2(e) 17
Section 703(h), 42 U.S.C. 2000e-2(h) (Bennett Amendment) ..... *passim*
Section 713(b), 42 U.S.C. 2000e-12(b) 27
Equal Pay Act of 1963, 29 U.S.C. 206 *et seq.*:
Section 3, 29 U.S.C. 206 21
Section 3(d), 29 U.S.C. 206(d) 1, 3, 5, 6, 13, 15
Fair Labor Standards Act, 29 U.S.C. 201 *et seq.* 1
Section 13, 29 U.S.C. 213 15
Trade Secrets Act, 18 U.S.C. 1905 16

Statutes and regulations—Continued — Page

29 C.F.R.:

Section 1601.30 (1965) 27
Section 1601.33 (1979) 27
Section 1604.8 (1979) 24

Miscellaneous:

Commission Decision, Case No. AU 7-3-173 (Apr. 17, 1968) 26
Commission Decision and Supplemental Decision, Case Nos. 5-12-3175 through 5-12-3179 (Aug. 8 and Sept. 16, 1966) 26
108 Cong. Rec. 22082 (1962) 21
109 Cong. Rec. (1963):

pp. 7293, 7848 21
p. 9193 19
p. 9195 ..... 19, 21
p. 9196 ..... 19, 21
p. 9197 19
p. 9204 19
p. 9205 19
pp. 9209-9210 21
p. 9217 21

110 Cong. Rec. (1964):

p. 2578 9
pp. 2578-2580 9
pp. 2580-2581 9
p. 2582 9
pp. 2582-2583 9
p. 7212 18
pp. 11926, 11931 22
p. 13647 ..... 19, 23
p. 14239 22
p. 15896 23

111 Cong. Rec. (1965):

p. 13359 17
pp. 18261-18263 ..... 18, 24

Miscellaneous—Continued Page

Decision No. 66-5762, 1973 EEOC Decisions (CCH) ¶ 6001 n.22 (June 20, 1968) 25-26
Decision No. 71-2629, 1973 EEOC Decisions (CCH) ¶ 6300 (Sept. 5, 1969) 26
Decision No. 70-112, 1973 EEOC Decisions (CCH) ¶ 6108 (June 25, 1971) 26
Exec. Order No. 12067, 43 Fed. Reg. 28967 (1978) 1
Exec. Order No. 12144, 44 Fed. Reg. 37193 (1979) 1
30 Fed. Reg. 14928 (1965) 25
35 Fed. Reg. 18692 (1970) 27
Gitt & Gelb, *Beyond The Equal Pay Act: Expanding Wage Differential Protection Under Title VII*, 8 Loy. U.L.J. 723 (1977) 9, 12
H.R. 11677, 87th Cong., 2d Sess. (1962) 21
H.R. 6060 and S. 1409, 88th Cong., 1st Sess. (1963) 21
H.R. Rep. No. 1714, 87th Cong., 2d Sess. (1962) 21
H.R. Rep. No. 309, 88th Cong., 1st Sess. (1963) 21
H.R. Rep. No. 238, 92d Cong., 1st Sess. (1971) 12
Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963*, 20 Hastings L.J. 305 (1968) 8-9
Reorg. Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978) 1
S. 1409, 88th Cong., 1st Sess. (1963) 21
S. Rep. No. 176, 88th Cong., 1st Sess. (1963) 21
S. Rep. No. 92-415, 92d Cong., 1st Sess. (1971) 12
2A C. Sands, *Sutherland Statutory Construction* (4th ed. 1973) 14, 17, 18
Webster's Third New International Dictionary (1976 ed.) 14

INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The Equal Employment Opportunity Commission is charged with the administration, interpretation, and enforcement of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Equal Pay Act of 1963, 29 U.S.C. 206(d). See Reorg. Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978); Exec. Order No. 12067, 43 Fed. Reg. 28967 (1978); Exec. Order No. 12144, 44 Fed. Reg. 37193 (1979). The Department of Justice also has important enforcement responsibilities under Title VII, and the Department of Labor retains enforcement responsibilities under other provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, to which the Equal Pay Act was added by Congress. This case presents the question whether the Equal Pay Act precludes women, unlike other classes protected by Title VII, from seeking relief under Title VII against employers who discriminate by evaluating and compensating employees on the basis of sex, unless the discrimination would also violate the narrow prohibition contained in the Equal Pay Act.

STATEMENT

Respondents, four women who were previously employed as jail matrons by the County of Washington, Oregon, brought this employment discrimination action in the United States District Court for the District of Oregon, alleging that petitioners, the county and its sheriff, violated respondents' rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Respondents alleged that "[i]n their employment * * * as jail matrons, [they] received lower compensation than male employees performing substantially the same services" (C.A. App. 2).[1] Based on the record developed

[1] Under state law, guards responsible for female prisoners must be women (Pet. App. 71a, 75a n.9). Although there is no analogous

during pretrial proceedings and at trial, the district judge understood this allegation to encompass two distinct claims. First, respondents claimed that the men's and women's jobs, although equal in skill, effort, and responsibility, were not compensated equally. The court said (Pet. App. 67(a); footnote omitted):

> The matrons contend that their jobs were substantially equal to those of the [male] deputy sheriffs and the [male] corrections officers. The County contends that there were significant differences between the men's and women's jobs and that those differences accounted for the salary differentials.

Alternatively, respondents claimed that even if their jobs were not precisely equal in terms of skill, effort, and responsibility, the county had nonetheless violated Title VII by setting matrons' wages at a depressed level because of respondents' sex.[2] The district court also summarized this claim (*id.* at 69a):

---

requirement with respect to guards responsible for male prisoners (*id.* at 23a, 60a), it appears that such jobs have always been held by men. Until 1973, the task of guarding male prisoners was performed by "deputy sheriffs"; thereafter, the task was performed by "corrections officers" (*id.* at 60a-61a, 67a). The monthly pay range for these employees immediately before and after February 1, 1973, is as follows (*id.* at 61a):

	Before Feb 1, 1973	Effective Feb. 1, 1973
Deputy Sheriffs	$668-853	$736-940
Deputy Sheriff Recruits	636-736	701-812
Corrections Officers	-	701-896
Corrections Officer Trainees	-	668-812
Matrons	476-606	525-668

[2] Petitioner Barnes, the county sheriff, testified at trial that the difference in pay was greater than that which could be justified by the difference in job duties (Tr. 56-58, 68-69). Because the district court thought that information irrelevant as a matter of law (Pet. App. 70a), respondents were apparently precluded from fully developing the record with respect to their second claim. Thus, the court of appeals found that further proceedings might be necessary on remand (*id.* at 18a-19a, 39a, 55a n.11).

> The matrons contend * * * that even if the men's jobs were more difficult, the differences in pay were much greater than the differences in the difficulty of the work. The matrons contend that some of the differences in pay can be explained only by the existence of sex discrimination.

In evaluating respondents' first claim, the court applied the "equal work" standard of the Equal Pay Act, 29 U.S.C. 206(d), which it found controlling with respect to equal pay claims brought under Title VII. The district court found that the men's and women's jobs were not equal because, although they were equal in skill, they were not equal in terms of effort or responsibility. The court found that the matrons guarded fewer prisoners and devoted a substantial amount of time to clerical duties (Pet. App. 59a-60a, 67a-69a). Thus, the court dismissed respondents' first claim for lack of proof (*id.* at 68a-69a).

The court then dismissed respondents' second claim, which it found insufficient as a matter of law. The court held (*id.* at 70a):

> If the jobs are substantially dissimilar, that is the end of the inquiry. *See* 29 C.F.R. § 800.120 (1965). Under these circumstances, the overpayment of corrections officers or the underpayment of matrons are not matters which I can either explore or correct.

The district court therefore entered judgment for petitioners.[3]

The court of appeals reversed the district court's dismissal of respondent's second compensation claim, but affirmed the judgment in all other respects (Pet. App. 20a-56a). While recognizing that the Equal Pay Act prohibits only one type of discrimination, the payment of

---

[3] In addition to their compensation claims, respondents alleged that petitioners had also violated Title VII by terminating their employment in retaliation for their demands for equal pay. See C.A. App. 2. The district court concluded that the evidence did not support that allegation (Pet. App. 70a-73a), and the court of appeals affirmed (*id.* at 39a-49a). That issue is not presented here.

unequal wages for equal work, the court of appeals noted that the prohibition of Section 703(a) of Title VII is "much broader" (*id.* at 32a). The court reasoned that the standards of the Equal Pay Act must apply when "equal work" claims are brought under Title VII, but that the Equal Pay Act would not apply to other compensation claims unless, as petitioners contended, the contrary result was required by the so-called Bennett Amendment, the second sentence of Section 703(h) of Title VII (*id.* at 31a-32a). The court therefore examined the language and legislative history of the Bennett Amendment, concluding that the amendment "incorporat[ed] the Equal Pay Act's four affirmative defenses, but not its equal work standard" (*id.* at 33a). Thus, the court of appeals held that respondents were entitled to prove, if they could, that a portion of the discrepancy between their salaries and those of their male counterparts could be ascribed only to sex discrimination, and the case was remanded for that purpose (*id.* at 38a-39a).

On denial of rehearing, the court further clarified its holding (Pet. App. 17a):

> Where a Title VII plaintiff, claiming wage discrimination, attempts to establish a prima facie case based solely on a comparison of the work she performs, she will have to show that her job requirements are substantially equal, not comparable, to that of a similarly situated male. The standards developed under the Equal Pay Act are relevant in this inquiry. In most cases, an equal work theory will provide the most practical method of establishing a prima facie case of wage discrimination. All we hold here is that a plaintiff is not precluded from establishing sex-based wage discrimination under some other theory compatible with Title VII.

SUMMARY OF ARGUMENT

This case presents an important question involving the proper relationship of two federal statutes that were enacted by Congress to protect women against employment discrimination. The question presented is whether

the Equal Pay Act of 1963, 29 U.S.C. 206(d), "authorizes" all types of sex-based compensation discrimination except that practice expressly prohibited by the Act —the payment of unequal wages because of sex for equal work in establishments covered by the Fair Labor Standards Act—and thus precludes women, unlike other persons protected by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, from invoking Title VII against any type of compensation discrimination that does not violate the narrow prohibition of the Equal Pay Act. As the Third Circuit has suggested, the ultimate issue for decision is straightforward: "whether Congress intended to permit [an employer] to willfully discriminate against women in a way in which it could not discriminate against blacks or whites, Jews or Gentiles, Protestants or Catholics, Italians or Irish, or any other group protected by [Title VII]." *International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC* v. *Westinghouse Electric Corp.*, 631 F.2d 1094, 1097 (1980), petitions for cert. pending, Nos. 80-781 (filed Nov. 14, 1980) and 80-944 (filed Dec. 11, 1980). The answer to this question is equally straightforward. There is no basis in the language or legislative history of Title VII for concluding that Congress intended, with respect to women, to limit the comprehensive protection afforded by that statute merely because the Equal Pay Act protects women against a particular type of compensation discrimination in particular circumstances.

The language of Title VII could not more clearly prohibit all forms of compensation discrimination based on race, color, religion, sex, and national origin. Section 703(a)(1) of Title VII, 42 U.S.C. 2000e-2(a)(1), prohibits employers from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of * * * race, color, religion, sex, or national origin." Likewise, Section 703(a)(2) of Title VII, 42 U.S.C. 2000e-2(a)(2), provides that it shall be unlawful for an employer "to limit, segregate, or classify his employees * * * in any way which would deprive or tend to deprive any

individual of employment opportunities or otherwise adversely affect his status as an employee, because of * * * race, color, religion, sex, or national origin."

Petitioners seek to avoid the obvious force of this language, however, by asserting that compensation claims by women have an inferior status under Title VII because of the so-called Bennett Amendment, which provides that, "[i]t shall not be an unlawful employment practice * * * for any employer to differentiate on the basis of sex in determining the amount of wages or compensation paid * * * to employees * * * if such differentiation is authorized by the provisions of section 206(d) of title 29." Section 703(h) of Title VII, 42 U.S.C. 2000e-2(h). The Equal Pay Act of 1963, 29 U.S.C. 206(d), in turn provides that, "[n]o employer * * * shall discriminate, within any establishment * * *, between employees on the basis of sex by paying wages in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex * * * for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex."

It is clear that the scope and effect of the Bennett Amendment must be ascertained by determining what differentiations are "*authorized* by the provisions of section 206(d) of Title 29" (Section 703(h) of Title VII, 42 U.S.C. 2000e-2(h) (emphasis added)). The answer appears on the face of the statute: differentiations in pay for equal work are authorized if they may be justified under one of the four enumerated exceptions of the Equal Pay Act.

Congress adopted the Bennett Amendment because it recognized that claims actionable under the Equal Pay Act might also be brought under Title VII. In those circumstances, Congress intended that employers not be de-

prived of the affirmative defenses provided by the earlier statute. The proponents of Title VII recognized that the standards of the Equal Pay Act would apply, by virtue of the doctrine of in pari materia, to equal work claims brought under Title VII. Initially, they explicitly provided that some, but not all, of the exceptions of the Equal Pay Act would apply to Title VII compensation claims. By adopting the Bennett Amendment, Congress assured that all of those exceptions would be applicable in such cases.

There is no basis for petitioners' contention that Congress intended, when it adopted the Bennett Amendment, to "authorize" all sex-based discrimination that was not expressly prohibited by the Equal Pay Act. Petitioners' construction would eviscerate the integrity of Title VII by making one principle applicable to claims based on sex, while another principle would apply to claims based on all other unlawful classifications. Nothing in the legislative history suggests that intention. Indeed, the history of the Bennett Amendment shows that it was proposed and adopted as a "technical" amendment, which hardly supports petitioners' assertion that the amendment was intended to alter the fundamental concept of discrimination contained in Section 703(a) of Title VII. Moreover, Senator Bennett proposed the amendment, and it was accepted, as an amendment to Section 703(h), a section that deals only with defenses, not with definitions of actionable discrimination.

Under petitioners' view, Title VII claims by women alleging sex-based compensation discrimination would not be actionable unless the plaintiffs could show that men and women held equal jobs. If that view were correct, the result would be anomalous: women would be afforded something less than the comprehensive protection afforded by Title VII simply because Congress had previously provided partial protection for them against a particular form of discrimination. Women would thus have no remedy, as the Ninth Circuit correctly noted (Pet. App. 54a n.9), in the face of the most unvarnished discrimination:

> Assume for example, that an employer tells a female worker, not employed at a position that is substantially equal to that performed by a male, that he would pay her $30 a week more if she was male. For want of a male counterpart performing equal work, such blatant discrimination would not be prohibited by the Equal Pay Act. * * * We find no indication, however, that the Bennett Amendment was intended to legalize such practices under Title VII.

ARGUMENT

I. Section 703(a) Of Title VII Prohibits All Forms Of Discrimination In Compensation Based On Race, Color, Religion, Sex, Or National Origin

Section 703(a) of Title VII, 42 U.S.C. 2000e-2(a), is unequivocal in its prohibition of all forms of discrimination in the evaluation and compensation of jobs. Section 703(a)(1) of Title VII provides that it shall be unlawful "to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of * * * race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1). Likewise, Section 703(a)(2) of Title VII provides that it shall be unlawful "to limit, segregate or classify * * * employees * * * in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of * * * race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(2). The language of Section 703(a) leaves no room for doubt concerning Congress' intention to proscribe every form of invidious discrimination in employment, and to do so fully with respect to each of the classes protected by Title VII.[4] As this Court said in

---

[4] Petitioners apparently suggest (Pet. Br. 42-45) that the prohibition against sex discrimination should be construed more narrowly than the other provisions of Section 703(a) because this prohibition was added by an opponent of Title VII who thereby sought to undermine support for the legislation (Pet. Br. 43). Whatever the merits of that factual assertion (see Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil*

Franks v. *Bowman Transp. Co.*, 424 U.S. 747, 763 (1976), "Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin, * * * and ordained that its policy of outlawing such discrimination should have the 'highest priority' * * *."

That Section 703(a) protects women against compensation discrimination to the same extent that other classes are protected was made clear in *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702 (1978). In *Manhart*, the Court held that Section 703(a) prohibited an employer from deducting from the paychecks of female workers a pension fund contribution which exceeded that deducted from the paychecks of men, thus reducing the take-home-pay of all women. Noting that "a statute that was designed to make race irrelevant in the employment market * * * could not reasonably be construed to permit a take-home-pay differential based on a racial classification" (*id.* at 709; footnote omitted), the Court found no basis for concluding that a different result should obtain simply because the discrimination was based on sex rather than race. The Court said (*id.* at 708-709):

> The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply com-

---

Rights Act and the Equal Pay Act of 1963, 20 Hastings L.J. 305, 310-312 n.30 (1968); Gitt & Gelb, *Beyond The Equal Pay Act: Expanding Wage Differential Protections Under Title VII*, 8 Loy. U.L.J. 723, 743-745 (1977)), the secret motivation of the congressman who offered the amendment is certainly irrelevant in ascertaining what Congress as a whole intended when it added this prohibition to the statute. Indeed, several members of Congress emphasized the great need to protect women against discrimination. See, *e.g.*, 110 Cong. Rec. 2578 (1964) (remarks of Rep. Bolton); *id.* at 2578-2580 (remarks of Rep. Griffiths); *id.* at 2580-2581) (remarks of Rep. St. George); *id.* at 2582 (remarks of Rep. May); *id.* at 2582-2583 (remarks of Rep. Kelly). At all events, petitioners' argument comes too late in the day. *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702, 709, 711 (1978).

> ponents of a racial, religious, sexual, or national class. If height is required for a job, a tall woman may not be refused employment merely because, on the average, women are too short. Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply. * * *
>
> * * * * * *
>
> [T]he question of fairness to various classes affected by the statute is essentially a matter of policy for the legislature to address. Congress has decided that classifications based on sex, like those based on national origin or race, are unlawful.

The Court held that the employer's practice did "not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different' " (435 U.S. at 711).

Not only did the Court in *Manhart* fail to perceive any principled distinction between claims based on sex and those based on race, but the Court did not find it necessary to determine whether the women who were disadvantaged by the discriminatory practice held jobs "equal" to those held by men. Although petitioners' theory appears not to have been urged in *Manhart*, the result reached in that case is inconsistent with petitioners' view.

When Congress enacted Title VII, it recognized that discrimination, which takes many forms, may be sophisticated or simple-minded. See *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792, 801 (1973). The broad language of Section 703(a) was designed to cast a net as broad as the evil that Congress sought to eradicate. In terms, Section 703(a) prohibits all forms of discrimination, including compensation discrimination, whether based on race, color, religion, sex or national origin.[5] If, for ex-

---

[5] Petitioners suggest (Pet. Br. 41) that the purposes of Title VII will be satisfied if women are protected only against discrimination in transfers and promotions. But such opportunities may not always exist and some women, although qualified for the underpaid jobs that they presently hold, may not have the skills necessary to secure other employment. That women may theoretically be able to move to jobs in which sex-based compensation practices

ample, an employer chose to award cost of living increases to white employees, but not to blacks, that discrimination undoubtedly would violate Section 703(a), without regard to the specific duties performed by the two classes. Likewise, if an employer were to define the qualifications for a unique job and set the yearly salary for that job at $15,000, and then reduce the salary to $10,000 when a qualified black was found, that discrimination would also violate Section 703(a), notwithstanding the uniqueness of the job. Finally, the use of two systems for fixing compensation, with one applicable to blacks and another applicable to whites, resulting in categorically inferior wages for blacks, would also violate Section 703 (a), without regard to whether blacks and whites were doing "equal" work. See *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505, 509-510 (E.D. Va. 1968).[6] Similar

---

are not present is irrelevant inasmuch as Section 703(a) prohibits discrimination not only in promotions and transfers, but also in compensation.

[6] Petitioners argue, as a policy matter (Pet. Br. 98-109), that Title VII should be construed to allow women to challenge only that form of compensation discrimination that would also violate the Equal Pay Act because the federal courts would otherwise be required to resolve difficult questions that they are ill-equipped to decide. However, as amicus AFL-CIO-CLC points out (Br. 16 n.7), questions of similar kind and difficulty were routinely decided by the National War Labor Board. We would also point out that the precise manner in which compensation claims are to be proved is not presently before the Court. The issue here is whether such claims are actionable. As amicus Lawyers' Committee correctly notes (Br. 9-15), however, such claims need not rest, as petitioners would have the Court believe (Pet. Br. 99-104), on proof of comparable worth of dissimilar jobs. At all events, petitioners' argument sweeps too broadly because it would logically apply with equal force to analogous claims brought by members of other protected classes, which the Bennett Amendment provides no basis for precluding. See *International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC* v. *Westinghouse Corp., supra*, 631 F.2d at 1097, 1100 n.7. Finally, there is no basis for petitioners' assertion (Pet. Br. 102) that the decision below will result in "a torrent of litigation." The reported decisions show that few women or other persons protected by Title VII have brought such claims in the past, and, as the Ninth Circuit noted (Pet. App. 39a), "problems

historical practices of discrimination against women have been documented. See *International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC* v. *Westinghouse Corp., supra*, 631 F.2d at 1097-1098.

On its face, Section 703(a) prohibits the same types of discrimination when practiced against women (see Pet. App. 54a n.9),[7] but petitioners' theory would provide no relief to women in such circumstances unless they could prove that their jobs were "equal" to those held by the men who were the beneficiaries of the employer's discrimination.[8] Petitioners' theory is thus inconsistent with the basic purpose of Title VII, and, as we shall now show, there is no reason to believe that Congress intended such a result.

II. The Bennett Amendment Does Not Preclude Women From Seeking Relief Under Title VII For Forms Of Compensation Discrimination That Would Not Also Violate The Equal Pay Act

Petitioners contend that the Bennett Amendment, the second sentence of Section 703(h), 42 U.S.C. 2000e-2(h), should be construed to preclude women, unlike other protected classes, from invoking Title VII against any form of compensation discrimination that would not also violate the Equal Pay Act. The court below properly rejected that far-reaching contention (Pet. App. 2a-16a,

---

of proof may present substantial barriers to establishing this kind of discriminatory compensation claim." Although aggrieved persons may generally be reluctant to face those barriers, "[s]uch problems * * * are not sufficient reasons to foreclose * * * the opportunity to establish a claim of discrimination" (*ibid.*).

[7] Moreover, when Congress amended Title VII in 1972, it confirmed its intent to proscribe all forms of compensation discrimination against women, not merely that which was the most obvious. See H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 4-5 (1971); S. Rep. No. 92-415, 92d Cong., 1st Sess. 7 (1971).

[8] The practical implications of petitioners' theory are suggested by the fact that a substantial part of the female workforce is employed in jobs that are largely filled by women. See Gitt & Gelb, *Beyond The Equal Pay Act: Expanding Wage Differential Protection For Women Under Title VII*, 8 Loy. U.L.J. 723, 725 & nn.12-14 (1977).

30a-39a), which is supported by neither the language nor the legislative history of the Bennett Amendment.[9]

A. *The Language of the Bennett Amendment*

The Bennett Amendment addresses the relationship between that which is "authorized" by the Equal Pay Act and that which Title VII prohibits (Section 703(h) of Title VII, 42 U.S.C. 2000e-2(h)):

> It shall not be an unlawful employment practice under [Title VII] for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of [the Equal Pay Act].

The language of the amendment is plain and unambiguous: Employers may engage in any practice "authorized" by the Equal Pay Act, without violating Section 703(a) of Title VII. Thus, the question presented turns upon a determination of what practices are "authorized" by the Equal Pay Act.

The Equal Pay Act provides (29 U.S.C. 206(d)):

> No employer * * * shall discriminate, within any establishment * * * between employees on the basis of sex by paying wages to employees * * * at a rate less than the rate at which he pays wages to employees of the opposite sex * * * for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which

---

[9] Petitioners' contention has also been rejected by the Third Circuit. See *International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC* v. *Westinghouse Corp., supra*, 631 F.2d at 1099-1108. Although petitioners contend (Pet. Br. 94-98) that that decision and the decision below in this case conflict with the decisions of other courts of appeals, that conflict is illusory, as the Third Circuit correctly noted (631 F.2d at 1106-1107), because the issue presented here was not presented or decided in those cases. See also amicus Lawyers' Committee Br. 22-24.

> measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex * * *.

Thus, by its terms, the Equal Pay Act does not "authorize" particular compensation practices. The scheme of the Act is to prohibit specific conduct—the payment of unequal wages, based on sex classification, to persons working in an establishment covered by the Fair Labor Standards Act and doing equal work requiring equal skill, effort, and responsibility, under similar working conditions—and then to sanction or except that conduct from the prohibition in four circumstances.

The common meaning[10] of "authorize" is "endorse, empower, justify * * * sanction * * *." *Webster's Third New International Dictionary* 146 (1976 ed.). Thus, "[a]uthorize indicates endowing formally with a power or right to act * * *" (*id.* at 147). To use the word "authorized" properly in the present context, one would have to say that the Equal Pay Act prohibits the particular practice of paying unequal wages for equal work, but that the prohibited practice is "authorized" or sanctioned when one of the four exceptions applies. Construing the Equal Pay Act and the Bennett Amendment together,

---

[10] The words of a statute must be afforded their ordinary meaning in the absence of persuasive evidence to the contrary. *Perrin* v. *United States*, 444 U.S. 37, 42 (1979); *Burns* v. *Alcala*, 420 U.S. 575, 580 (1975); *Banks* v. *Chicago Trimmers Ass'n*, 390 U.S. 459, 465 (1968); *Caminetti* v. *United States*, 242 U.S. 470, 485-486 (1917). Contrary to petitioners' contention (Pet. Br. 70-73), this well-established principle of statutory construction does not make "a fortress out of the dictionary." As the Court noted in *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 199 n.19 (1976), "legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has the right to rely on ordinary words addressed to him." Moreover, "the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." *Chandler* v. *Roudebush*, 425 U.S. 840, 848 (1976). See generally, 2A C. Sands, *Sutherland Statutory Construction* §§ 45.08, 47.28 (4th ed. 1973).

therefore, one must conclude that the Equal Pay Act "authorizes" four exceptions to its prohibition, and the Bennett Amendment thus incorporates those exceptions within Section 703(h) of Title VII as defenses to similar claims under that title.[11]

Petitioners do not discuss the meaning of the word "authorize," but their construction of the Equal Pay Act suggests that all compensation practices that are not explicitly prohibited by the Act are "authorized" by the Bennett Amendment. On that theory, the Bennett Amendment would "authorize" every kind of sex-based compensation discrimination involving employees who are either not performing "equal" work (29 U.S.C. 206(d)), or are performing "equal" work in different "establishment[s] of the same employer (*ibid.*) or in jobs exempted from the coverage of the Fair Labor Standards Act (see 29 U.S.C. 213).[12] Petitioners' theory clearly proves too much because it defies common sense to suggest that Congress, by prohibiting a specific practice, subject to enumerated exceptions, thereby intended sub silentio to authorize every conceivable practice similar to that which is prohibited (including practices prohibited by Congress in other legislation).[13]

---

[11] This construction of the statutory language is supported by the Court's decision in *Los Angeles Department of Water & Power* v. *Manhart*, *supra*, 435 U.S. at 712 n.23, in which the Court said, "[w]e need not decide whether retirement benefits or contributions to benefit plans are 'wages' under the [Equal Pay] Act, because the Bennett Amendment extends the Act's four exceptions to all forms of 'compensation' covered by Title VII."

[12] As we have shown (pages 9-10, *supra*), that result is inconsistent with the Court's decision in *Los Angeles Department of Water & Power* v. *Manhart*, *supra*.

[13] Even if other specific practices were addressed but not expressly prohibited by the statute, it would nonetheless be erroneous to suggest that such practices were thereby "authorized." For example, Title II of the Civil Rights Act of 1964, the public accommodations provision, expressly states that its "provisions * * * shall not apply to a private club or other establishment not in fact open to the public * * *." 42 U.S.C. 2000a(e). One would not be justified, however, in stating that Title II thereby "authorizes"

Moreover, if the purpose of the Bennett Amendment was, as petitioners contend, to narrow the definition of compensation discrimination under Section 703(a), by excluding those women's compensation claims that were not also actionable under the Equal Pay Act, it is difficult to see why the Bennett Amendment was proposed and adopted as an amendment to Section 703(h), a section that deals narrowly with certain defenses.[14] If that had

---

discriminatory practices by such clubs. Similarly, Title VII provides that it does not reach employers with fewer than 15 employees (42 U.S.C. 2000e(b)), but it would not be accurate to state that Title VII "authorizes" discriminatory practices by such employers. Where Congress has considered a problem of some breadth and complexity, such as employment discrimination, and has legislated only with respect to a particular part of the problem, there is no justification for asserting that Congress has "authorized" that which it has merely failed to prohibit.

A similar question was presented in *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979), in which the Court was required to construe the Trade Secrets Act, 18 U.S.C. 1905, which prohibits government employees from disclosing trade secrets unless such disclosures are otherwise "authorized by law." The Court rejected the contention of the Office of Federal Contract Compliance Programs that its statutory authority to collect trade secrets information impliedly authorized its disclosure: "[U]nless we were to hold that any federal statute that implies some authority to collect information must grant *legislative* authority to disclose that information to the public, it is simply not possible to find in these statutes a delegation of the disclosure authority asserted * * * here" (441 U.S. at 306; emphasis in original).

[14] The various provisions of a section are generally construed as dealing with the same subject matter. See *Neal* v. *Clark*, 95 U.S. 704, 708-709 (1877). The first sentence of Section 703(h) narrows the scope of claims and excludes certain proof, but it does not deprive any protected class of any particular claim that might be brought under Section 703(a). Unlike petitioners' theory, our construction of the Bennett Amendment permits both sentences to be read as addressing the same subject matter. Petitioners' assertion (Pet. Br. 73-75) that this construction of the Act creates redundancy in the two sentences is without merit. The exceptions contained in the two sentences are similar, but not identical. For example, the first sentence provides an exception for "a bona fide seniority or merit system * * * provided that * * * differences are not the result of an intention to discriminate because of * * * sex

been Congress' intent, it would have been far easier (and clearer) to amend Section 703(a) to modify the general prohibition against compensation discrimination by providing that sex-based compensation discrimination was unlawful only if it also violated the Equal Pay Act. Likewise, Congress could have amended Section 703(e) of Title VII, which exempts from coverage certain class-based differentiations, including sex-based differentiations where sex is a bona fide occupational qualification. Congress could have provided there that sex-based compensation differentiations would not constitute actionable discrimination under Title VII unless they also violated the Equal Pay Act.

B. *The Legislative History of the Bennett Amendment*

Although the legislative history of the Bennett Amendment is neither extensive nor wholly devoid of ambiguity,[15] it generally supports the view that the word "authorize" should be given its common meaning, thus including within Section 703(h) the four exceptions con-

---

* * *." The second sentence provides an exception for "a seniority system" and "a merit system" without additional qualification. Moreover, the final exception provided by the second sentence is far broader than any exception contained in the first sentence. See pages 20-21, *infra*.

[15] To the extent that the legislative history is ambiguous, it "should not be permitted to control the customary meaning of words." *NLRB* v. *Plasterers Local Union No. 79*, 404 U.S. 116, 129 n.24 (1971). Because the meaning of the word "authorized" is clear on its face, and that meaning is consistent with the fundamental remedial policy of Title VII, exceptionally strong evidence of a contrary legislative intent would be required to establish that the Bennett Amendment immunizes intentional sex-based compensation discrimination. Such evidence is not present here, where the legislative history consists entirely of floor debate (see 2A C. Sands, *Sutherland Statutory Construction* § 48.13 (4th ed. 1973)), and Senator Bennett later characterized his own remarks, upon which petitioners mainly rely, as having created "confusion" (111 Cong. Rec. 13359 (1965)). The legislative history was fully considered by the court below (Pet. App. 3a-19a) and by the Third Circuit in *International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC* v. *Westinghouse Corp., supra*, 631 F.2d at 1099-1105. Neither court found any support for petitioners' view.

tained in the Equal Pay Act. Senator Bennett offered his amendment on the Senate floor on June 16, 1974, after cloture had been invoked. The discussion of the Bennett Amendment was thus necessarily brief. Nonetheless, the statements of Senators Bennett, Humphrey, and Dirksen all show that the amendment was viewed as a "technical" amendment designed to dispel any uncertainty that might exist because of the fact that Section 703(h), prior to the adoption of the Bennett Amendment, contained exceptions that were similar to, but neither identical to nor as extensive as, those contained in the Equal Pay Act. Thus, the amendment was necessary to assure that the exceptions of the earlier statute were not nullified.

The entire discussion of the Bennett Amendment,[16]

---

[16] The only other relevant legislative history consists of material that was inserted in the Congressional Record two months before the Bennett Amendment was proposed. Senator Clark, the floor manager of the fair employment provisions, prepared responses to certain "objections" that had been raised concerning the legislation, including one addressing the relationship of the new legislation to the Equal Pay Act. See 110 Cong. Rec. 7212 (1964). Although Senator Clark's response neither contemplates the Bennett Amendment nor speaks to what is "authorized" by the Equal Pay Act, it nonetheless supports our view that Title VII's broad prohibition against compensation discrimination would not "nullify" the standards of the Equal Pay Act for equal work claims brought under Title VII. Indeed, Senator Clark stated that the standards of the earlier statute would continue to apply in "the comparable situation under title VII" (*ibid.*), that is, where litigation could have been brought under either statute, but is brought under Title VII. Thus, Senator Clark's response indicates a proper application of the principle that overlapping statutes should be construed harmoniously, or in pari materia. See 2A C. Sands, *Sutherland Statutory Construction* § 51.05 (4th ed. 1973). It is particularly significant that Senator Clark did not dispute the objectors' contention that Title VII recognizes compensation claims that cut across job lines. Finally, it is ironic that petitioners should construe Senator Clark's remarks as supporting their construction of the Bennett Amendment when he explicitly challenged that construction in 1965. See 111 Cong. Rec. 18261-18263 (1965).

Although petitioners (Pet. Br. 32-41) place undue reliance on the in pari materia principle, rather than looking to the language

from its proposal to its adoption, is as follows (110 Cong. Rec. 13647 (1964)):

> MR. BENNETT. Mr. President, after many years of yearning by members of the fair sex in this country, and after very careful study by the appropriate committees of Congress, last year Congress passed the so-called Equal Pay Act, which became effective only yesterday.
>
> By this time, programs have been established for the effective administration of this act. Now, when the civil rights bill is under consideration, in which the word "sex" has been inserted in many places, I do not believe sufficient attention may have been paid to possible conflicts between the wholesale insertion of the word "sex" in the bill and in the Equal Pay Act.

---

and legislative history of Title VII, we note that our construction of the Bennett Amendment also satifies that principle. It is elementary that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). As we have shown (pages 13-17, *supra*), our construction preserves the Equal Pay Act in the area which Congress ascribed to it, but fails to extend its rationale to a broader field. Our construction is also consistent with the fact that Congress seems to have considered the Equal Pay Act as only "one of the first steps toward an adjustment of balance in pay for women." 109 Cong. Rec. 9193 (1963) (remarks of Rep. Bolton). See also *id.* at 9205 (remarks of Rep. Sullivan); *id.* at 9193 (remarks of Rep. St. George); *id.* at 9195 (remarks of Rep. Frelinghuysen); *id* at 9196 (remarks of Rep. Thompson); *id.* at 9204 (remarks of Rep. Toll). While it is true that Congress expressed concern in 1963 with the concept of government review of wage rates in situations not involving "equal" work, that concern reflected a general resistance to government involvement in any private employment relationships, a concern that was not present in 1964, when Congress enacted Title VII. See 109 Cong. Rec. 9196 (1963) (remarks of Rep. Frelinghuysen); *id.* at 9197 (remarks of Rep. Goodell). It is likewise instructive, in understanding the relationship of the two statutes, to remember that the Equal Pay Act is part of the Fair Labor Standards Act, a statute with more limited goals than Title VII, and which, unlike Title VII, establishes strict liability. See *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 195-197 (1974).

> The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified.
>
> I understand that the leadership in charge of the bill have agreed to the amendment as a proper technical correction of the bill. If they will confirm that understand[ing], I shall ask that the amendment be voted on without asking for the yeas and nays.
>
> MR. HUMPHREY. The amendment of the Senator from Utah is helpful. I believe it is needed. I thank him for his thoughtfulness. The amendment is fully acceptable.
>
> MR. DIRKSEN. Mr. President, I yield myself 1 minute. We were aware of the conflict that might develop, because the Equal Pay Act was an amendment to the Fair Labor Standards Act. The Fair Labor Standards Act carries out certain exceptions. All that the pending amendment does is recognize those exceptions, that are carried in the basic act.
>
> Therefore, this amendment is necessary, in the interest of clarification.

In analyzing the legislative history, two points are significant. First, the Bennett Amendment was proposed and adopted as a "technical" amendment, which was "necessary, in the interest of clarification." It was not represented as a sweeping, substantive amendment affecting the basic coverage of Title VII. Second, the amendment was proposed to assure that in the event of conflicts, there would be no nullification of the exceptions of the Equal Pay Act, which had been enacted "after very careful study by the appropriate committees of Congress." Given the placement of the amendment in Section 703(h), and its description as a "technical" amendment, the "very careful study" to which Senator Bennett alluded must have been the careful consideration that Congress had given to the process of developing the four exceptions contained in the Equal Pay Act.

When the Equal Pay Act was introduced in 1962, the House bill included only the three specific exceptions that

later became the first three exceptions of the Act. See H.R. 11677, 87th Cong., 2d Sess. (1962); H.R.Rep. No. 1714, 87th Cong., 2d Sess. (1962). When the Senate considered the House bill, the bill had been amended to include a fourth general exception, "where [a differential] payment is attributable to ascertainable and specific added costs resulting from the employment of the opposite sex." See 108 Cong. Rec. 22082 (1962). In 1963, both the Senate and House bills contained a general exception for "a differential based on any other factor other than sex," which later became the fourth exception of the Act. See 109 Cong. Rec. [illegible]. 7293, 7848 (1963); S. 1409, and H.R. 6060, 88th Cong., 1st Sess. (1963). When the Senate Committee on Labor and Public Welfare reported S. 1409, it deleted the three specific exceptions and included only the fourth, or general, exception. See S. Rep. No. 176, 88th Cong., 1st Sess. 4 (1963). The Committee Report noted that the three specific exceptions are "valid exceptions" where not based upon sex and that, in addition, "[w]ithout question, employers have other valid classification programs which can justify an exception." The Committee further noted that whether an exception is justified "can only be answered by an ad hoc investigation" (*ibid.*). When the House Committee on Education and Labor reported H.R. 6060, it included both the three specific exceptions and the fourth, or general, exception. See H.R. Rep. No. 309, 88th Cong., 1st Sess. (1963). Much of the floor debate in the House focused on the fourth exception, which had not been discussed in the House during the year before. See 109 Cong. Rec. 9195-9196 (1963) (remarks of Rep. Frelinghuysen); *id.* at 9196 (remarks of Rep. Thompson); *id.* at 9203 (remarks of Reps. Fountain and Griffin); *id.* at 9205-9206 (remarks of Rep. Griffin); *id.* at 9209-9210 (remarks of Rep. Goodell); *id.* at 9217 (remarks of Rep. Findley). The final bill, as enacted, included the three specific exceptions first proposed by the House and a general exception first suggested (109 Cong. Rec. 7293 (1963)) by the Senate. See 29 U.S.C. 206(d).

The substance of Senator Bennett's concern about "nullification" in the event of "conflicts" is clear when considered against this background. As proposed, the first sentence of Section 703(h) [17] included language similar to the first three exceptions of the Equal Pay Act. Like the original House version of the Equal Pay Act, however, the proposed language of Section 703(h) did not contain the general exception that was finally added to the Equal Pay Act. A substantial possibility existed, therefore, that the fourth exception of the Equal Pay Act would be "nullified" in cases in which both statutes applied, if only rough equivalents of the first three exceptions of the Equal Pay Act were contained in Section 703(h). Thus, an employee would be able to bring an equal work claim under Section 703(a), assert that Congress had explicitly reconsidered and revised the exceptions, and accordingly contend that the fourth exception of the Equal Pay Act did not apply. Senator Bennett was obviously concerned that employers might never be able to base employment decisions upon factors "other than sex" itself, that might have a differential impact upon persons of a particular sex. See *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976). Cf. *Corning Glassworks* v. *Brennan*, 417 U.S. 188, 204-205 (1974). The inclusion in Section 703(h) of the four exceptions of the Equal Pay Act satisfied precisely those concerns.[18]

---

[17] It is important to recognize that even the first sentence of Section 703(h) was a late addition to the bill, having appeared for the first time when the Mansfield-Dirksen substitute was introduced in the Senate on May 26, 1964. See 110 Cong. Rec. 11926, 11931 (1964). The Bennett Amendment was offered and adopted on June 12, 1964 (*id.* at 13467). The Mansfield-Dirksen substitute passed the Senate on June 17, 1964 (*id.* at 14239).

[18] Petitioners' broader reading of the comments made by Senators Bennett, Dirksen, and Humphrey is unjustified. It is not realistic to believe that Senator Bennett thought that Title VII would "nullify" the equal work standards of the Equal Pay Act with respect to equal work claims brought by women under Title VII. Certainly, the provisions of the two statutes would be harmonized in any event to maintain the same standards with respect to the same claims. No employee could legitimately argue that Con-

The response to Senator Bennett made by Senator Dirksen, one of the principal sponsors of Title VII, also supports our construction.[19] Senator Dirksen's statement suggests that the draftsmen of Title VII had recognized that conflicts might arise between Title VII and the Equal Pay Act. Indeed, Title VII was to be administered and construed by a new agency, while the Equal Pay Act would continue to be administered by the Department of Labor. The earlier statute had "certain exceptions," and the draftsmen of Title VII had "carried" similar exceptions "in the basic [provisions of Title VII]." But, "in the interest of clarification," the Bennett Amendment was necessary to "recognize those exceptions." The meaning of Senator Dirksen's comment is clear and it cannot be brushed aside, as petitioners' suggest (Pet. Br. 61), by speculating that he "may even have been off on a tangent." [20]

---

gress had reconsidered and revised the standards for equal work claims under Title VII. Nor is it correct to say that Title VII "conflicts" with the Equal Pay Act simply because Title VII recognizes compensation claims that would not be actionable under the Equal Pay Act. Title VII compensation claims, except in the narrow area of overlap, are different claims based on different acts of discrimination. Finally, it is not realistic to believe that an amendment which, in petitioners' view, deprived one protected class of the right to sue for relief against all but one form of employment discrimination, could properly have been proposed and accepted as a "technical correction."

[19] Likewise, Senator Humphrey's statement indicates his agreement that the amendment was merely a "technical correction." 110 Cong. Rec. 13647 (1964).

[20] Petitioners rely on two additional portions of "legislative history" which, for different reasons, have doubtful value. First, petitioners assert that the statement made by Representative Celler, when the bill was returned to the House, "is entitled to great weight" (Pet. Br. 65). Representative Celler stated that the Bennett Amendment provided "that compliance with the Fair Labor Standards Act as amended satisfies the requirement of the title barring discrimination because of sex—section 703(h) [sic]." 110 Cong. Rec. 15896 (1964). That comment makes sense only if limited (by implication) to the kind of claims that are actionable under the Equal Pay Act. Otherwise, it would mean that women could sue under Title VII only for redress of violations of the

In short, the plain, dispositive fact is that the Bennett Amendment was designed merely to eliminate uncertainty as to the application of the Equal Pay Act exceptions in equal work cases brought under Title VII—and thus to eliminate the possibility of "conflict" between the two Acts (on which the floor discussion of the Bennett Amendment was exclusively focused). There is no evidence that Congress thereby intended to "authorize" all forms of compensation discrimination that were not prohibited by the Equal Pay Act and whose coverage by Title VII would raise no possibility of "conflict" with the Act.

C. *The Equal Employment Opportunity Commission's Construction of the Bennett Amendment*

The Commission's current guidelines on sex discrimination, which were adopted in 1972, interpret the Bennett Amendment as incorporating in Title VII only the defenses of the Equal Pay Act. See 29 C.F.R. 1604.8 (1979). Petitioners apparently concede (Pet. Br. 89-91) that the current guidelines are clear, and that they fail to support petitioners' construction. But petitioners attempt to show that the current guidelines are inconsistent with the Commission's original understanding, as reflected in its 1965 guidelines and in early statements of its general counsel. The court below properly

---

Equal Pay Act, and that they would have no remedy for discrimination in hiring, promotions, transfers, or dismissals. Clearly, that was not the intent of Congress. See also *Los Angeles Department of Water & Power* v. *Manhart*, *supra*, 435 U.S. at 713-714.

Second, petitioners rely (Pet. Br. 61-63) on a statement made by Senator Bennett in 1965 in a floor discussion, not of civil rights legislation, but of the cloture rules, in which he purported to expand on the statement that he had made when proposing the amendment. Senator Bennett's 1965 statement may well reflect his motivation in proposing the amendment, but the Ninth Circuit was clearly correct in noting (Pet. App. 6a) that this statement could not stand as evidence of "what was on Congress' collective mind when it acted a year earlier." Indeed, Senator Clark explicitly challenged the accuracy and validity of Senator Bennett's 1965 statement. See 111 Cong. Rec. 18261-18263 (1965). It is Congress' intent, and not the unexpressed motivation of a particular senator, that must inform the Court's inquiry here.

rejected that argument (Pet. App. 38a), holding that the current guidelines are not inconsistent with the earlier guidelines. Accord, *International Union of Electrical, Radio and Machine Workers, AFL-CIO* v. *Westinghouse, supra*, 631 F.2d at 1105-1106.

Petitioners' argument lacks merit for two reasons. First, petitioners ignore the existence of numerous Commission opinions, beginning in 1966, which are inconsistent with the construction that petitioners seek to attribute to the Commission by virtue of the 1965 guidelines and the early opinions of the general counsel. Second, petitioners' reliance on the early opinions of the general counsel depends in the main on drawing from them a negative implication with respect to matters that the general counsel neither explicitly considered nor addressed.

The Commission has consistently understood the statutory ban on sex-based compensation discrimination to be coextensive with the other prohibitions contained in Section 703(a), and the Commission has always taken the position that those rights under Title VII are not limited to the rights conferred by the Fair Labor Standards Act, as would logically be the case under petitioners' construction. Nothing in the 1965 guidelines is to the contrary.[21] Moreover, the Commission, beginning in 1966, issued a series of decisions that clearly demonstrate that it did not deem a finding of "equal work" necessary to establish a sex-based wage discrimination claim. Decision No. 66-5762, 1973 EEOC Decisions (CCH) ¶ 6001 n.22

---

[21] The 1965 guidelines merely recognize the need "to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable." 30 Fed. Reg. 14928 (1965). In other words, the guidelines recognize, as did Congress, that Title VII provides a remedy for that type of discrimination which is also actionable under the Equal Pay Act, and that Equal Pay Act standards should apply in that limited area of statutory convergence. That is not to suggest, however, that only cases that could be brought under the Equal Pay Act may be brought under Title VII. Likewise, the guidelines do not suggest that the effect of the Bennett Amendment is to limit the broad definition of discrimination contained in Section 703(a) of Title VII.

(June 20, 1968);[22] Decision No. 70-112, 1973 EEOC Decisions (CCH) ¶ 6108 (Sept. 5, 1969); Decision No. 71-2629, 1973 EEOC Decisions (CCH) ¶ 6300 (June 25, 1971). In these cases, the Commission found that lower pay scales for jobs held predominantly by women in sex-segregated work forces were discriminatory in certain circumstances. Thus, the Commission's current regulations reflect its contemporaneous and long-standing construction of its statute, and are therefore entitled to substantial deference. See *EEOC* v. *Associated Dry Goods Corp.*, No. 79-1068 (Jan. 26, 1981), slip op. 9 n.17.

Petitioners rely (Pet. Br. 81-88) on certain so-called "opinion letters"[23] of the Commission's general counsel, but these letters are not inconsistent with the Commission's guidelines or decisions. In none of these letters did the general counsel specifically address the question whether the Bennett Amendment limited the types of discrimination prohibited by Section 703(a) of Title VII or simply incorporated in Title VII the defenses of the Equal Pay Act. Moreover, even if the opinion letters were susceptible to the construction that petitioners would attribute to them, it is fundamental that opinions by the general counsel or an individual member of the Commission cannot constitute better evidence of the Com-

---

[22] In footnote 22, the Commission referred to:

> Commission Decisions finding discrimination based on race or sex where all the incumbents of a particular job classification are Negro or female, and the wage rate for that classification is depressed as compared with comparable work performed by white or male employees in other job classifications or in other plants in the industry.
>
> Commission Decision, issued Apr. 17, 1968, in Case No. AU 7-3-173; and Commission Decision and Supplemental Decision, issued on Aug. 8, and Sept. 16, 1966, respectively, in Case Nos. 5-12-3175 through 5-12-3179.

[23] Although none of the "opinion letters" supports petitioners' position, we disagree with petitioners' view that an informal staff memorandum (Pet. Br. App. 18a-22a) should be thus characterized in any event.

mission's understanding of the statute than do the Commission's own regulations and decisions.[24]

In sum, nothing in any of the early guidelines or opinions under Title VII can fairly be read as a determination that a system of disparate treatment of men and women with respect to compensation, or intentional discrimination in compensation on the basis of sex, is not within the coverage of Section 703(a) of Title VII. Indeed, the Commission's decisions, which are the most authoritative guide available here, are flatly inconsistent with that view.

---

[24] Indeed, the Commission has consistently adhered to the position that even materials formally issued as a "written interpretation or opinion" under Section 713(b) of Title VII, 42 U.S.C. 2000e-12(b), "[are] issued to a specific addressee(s) and [have] no effect upon situations other than that of the specific addressee(s)." 35 Fed. Reg. 18692 (1970). Cf. 29 C.F.R. 1601.30 (1966); 29 C.F.R. 1601.33 (1979). At all events, these letters are not entitled to "great weight." In considering a regulation of the Internal Revenue Service that conflicted with an earlier agency interpretation, the Court recently noted that "[c]ontemporaneity * * * is only one of many considerations that counsel courts to defer to the administrative interpretation of a statute." *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 485 (1979). Other considerations include "the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements * * *." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). To the extent that language in the letters can be read to support petitioners' construction, that language is in direct conflict with Commission decisions issued as early as 1966 (see pages 25-26, *supra*), which show the Commission did not deem a finding of "equal work" necessary to state a Title VII claim of sex-based wage discrimination. These decisions of the Commission, and not the informal opinion letters of the general counsel, comprise the Commission's reasoned and official interpretation of its statute. Thus, petitioners' reliance on *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), is inapposite.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JAMES P. TURNER
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

BARRY SULLIVAN
Assistant to the Solicitor General

WALTER W. BARNETT
NEIL H. COGAN
Attorneys

LEROY D. CLARK
General Counsel

PHILIP B. SKLOVER
Acting Associate General Counsel

VINCENT J. BLACKWOOD
Assistant General Counsel

SUSAN BUCKINGHAM REILLY
Attorney
Equal Employment Opportunity Commission

FEBRUARY 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 337959 258